

July 5, 2016

Chairman Thomas Wheeler
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: Docket No. 16-106, Protecting the Privacy of Customers of
Broadband and Other Telecommunications Services

Dear Chairman Wheeler:

As you sift through the filings assembled on this vital issue, I urge you to focus in particular on the thoughtful comments submitted by your peer agency, the Federal Trade Commission (FTC). No agency has the lengthy track record and deep experience in effectively protecting consumer privacy as the FTC, which has been the lead agency charged with policing online privacy since the inception of the commercial Internet in the 1990s. For this reason, its concerns about the FCC's current proposed framework and its suggestions towards an alternative consensus framework should be given serious consideration.

I. The Need for Consistent Standards

The FTC comments echo the longstanding Administration position that consumer data should be covered by one consistent set of standards, leading to the conclusion that the FCC's current proposal would create a patchwork approach to privacy that is "not optimal". This flows directly from the White House's prior call for "a level playing field for companies" and "consistent set of expectations for consumers" in its 2012 Privacy Framework¹ and your own prior commitment to "do our best to harmonize so that there is a common set of concepts that govern privacy."²

And this is no partisan concern – a former FTC Democratic Chairman, a former Republican FTC Commissioner, and other former senior FTC officials filed comments raising this precise issue and urged the FCC to change course. And bipartisan Members of the House of Representatives and Senate also agree that the FCC should adopt the approach espoused by the Democratic Administration. I urge you and your colleagues to take seriously the FTC's call for evenhanded privacy standards that will "ensure appropriate protections for consumers' privacy and data security across the marketplace."³

¹ Consumer Data Privacy in A Networked World, [February 2012](#).

² Tom Wheeler, Testimony, House Oversight Committee, [January 2015](#).

³ FTC Comments at [8](#).

II. Protecting Data Based On Its Sensitivity

One of the most important observations the FTC staff makes is that the level of protection afforded to particular items of data should depend on how sensitive that data is and what kind of protection consumers would likely expect. A rule that offers only minimal protection to personal health or financial records would clash with and ultimately undermine consumer expectations and fail to offer meaningful protection for sensitive online data. At the same time, imposing onerous opt in or other procedural requirements for the use of mundane data that consumers would not consider sensitive also imposes significant costs, stifling innovation and distorting markets for consumer products that require routine use and collection of non-sensitive – and many times not personally identifiable – data.

In other words, as the FTC concludes, the FCC’s approach “does not reflect the different expectations and concerns that consumers have for sensitive and non-sensitive data. As a result, it could hamper beneficial uses of data that consumers may prefer, while failing to protect against practices that are more likely to be unwanted and potentially harmful.”⁴ For instance, the FTC questioned several ways in which your proposed rules rely on inflexible standards and focuses on the kinds of products and services at hand instead of the sensitivity of data and information at issue.

The problem flagged by the FTC here is serious and will hurt consumers in two different ways – 1) by potentially underprotecting data consumers would consider highly sensitive when it is used in ways the NPRM does not believe worthy of heightened protection, and 2) overprotecting mundane information in ways that deny them access to services and information online.

To remedy this, the FTC staff “recommends that the FCC consider the FTC’s longstanding approach, which calls for the level of choice to be tied to the sensitivity of data and the highly personalized nature of consumers’ communications in determining the best way to protect consumers.”⁵

III. Enhancing Data Security

The FTC staff observed that, while the NPRM suggests data security should be governed by a reasonableness standard “calibrated to the nature and scope of the BIAS provider’s activities, the sensitivity of the underlying data, and technical feasibility,” the actual text of the proposed rule “would impose strict liability on companies for ‘ensuring’ security.”⁶ That is unfair and counterproductive – distracting attention and resources away from effective security practices and setting in motion counterproductive and defensive practices focused on managing this unreasonable threat of liability instead of addressing genuine issues and concerns.

The proposed rule on consumer notification of any data breach has similar problems – as the FTC staff observed, the rule as written is potentially so broad that it may require notice for

⁴ FTC Comments at [22](#).

⁵ FTC Comments at [23](#).

⁶ FTC Comments at [27](#).

actions as minor as an employee clicking on a wrong file and closing it without reading it or mistyped a name and briefly pulled up an incorrect account, without any further access, use, or sharing of data or information. The FTC staff warns this “overnotification” problem could lead consumers to “receive ‘a barrage of notices [and] ‘become numb to such notices, so that they may fail to spot or mitigate the risks being communicated to them.’”⁷

The Commission should redraft its proposed security and breach rules to focus on concepts of reasonableness, good faith, and effective practices as the FTC has championed for two decades overseeing privacy online. And the Commission should provide the FTC, consumer advocates, and industry stakeholders an opportunity to comment further on these revised proposed rules before they are finalized. Such transparency has been one of the hallmarks of the FTC, and is consistent with longstanding traditions at the FCC as well.

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It is not common for a government agency to raise such significant, substantive concerns in a formal filing to one of its peers. For that reason, I urge you and your colleagues to give these concerns the closest possible evaluation and review. While I do not endorse every observation or suggestion that the FTC has offered, overall, it has done consumers a valuable service by pointing the way towards modifications and revisions to your proposed broadband privacy rules that can lead to a far more effective, pro-consumer, pro-innovation path forward.

⁷ FTC Comments at [31](#).